84-740

No. .....

Office - Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUNE G. MOORE,

Petitioner,

vs.

REYNOLDS METAL COMPANY RETIREMENT PROGRAM FOR SALARIED EMPLOYEES

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

WHETHER FEDERAL COURTS HAVE JURISDICTION TO REVIEW THE SUBSTANTIVE PROVISIONS OF A PENSION PLAN FOR ARBITRARINESS WHERE THE PLAN WAS ENACTED UNILATERALLY BY THE COMPANY AND IS SOLELY ADMINISTERED BY THE COMPANY THROUGH ITS APPOINTEES.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION

June G. Moore, Petitioner herein, respectfully prays that a writ of certiorari issue to review the decision by the Court of Appeals for the Sixth Circuit reversing a decision in favor of the Petitioner rendered by the Federal District Court for the Southern District of Ohio, Western Division.

OPINIONS BELOW

Decision by the United States District Court for the Southern District of Ohio in Case No. C-1-82-433, in favor of the Petitioner was rendered on June 12, 1983, and is attached hereto as Appendix A and reported at 563 F.Supp. 1372 (S.D. Ohio 1983). Decision by the United States Court of Appeals

for the Sixth Circuit, in Case No. 83-3458, reversing the decision of the district court was decided and filed on August 10, 1984, and is attached hereto as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit in Case No. 83-3458 was entered on August 10, 1984.

The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1104(a)(1)(A) and (B):

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(a) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1132(a)(1)(B):

(a) a civil action may be brought—

(i) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

Petitioner June Moore is the widow of Donald Moore who had been employed by the Reynolds Metals Company (hereinafter referred to as "Reynolds") for 28 years at his death on September 27, 1981, at the age of 52 from cancer. As a salaried employee of Reynolds, he was a participant in the Reynolds Metals Company Retirement Program for Salaried Employees, the defendant below (hereinafter referred to as "Retirement Program"). Donald Moore was not a union member and the Retirement Program in which he was a participant was formulated and implemented by Reynolds.

The Retirement Program provides under Article 6.3 for death benefits to the surviving spouse of a participant who is "permanently disabled" within the meaning of that term as it is defined in Article 2.4 of the Retirement Program. To be considered permanently disabled the Retirement Program required a participant to be eligible for, *and in receipt of*, benefits under the Disability Insurance provisions of the Social Security Act. Donald Moore became afflicted with cancer and applied for disability benefits under the Social Security Act and although he was "disabled" for purposes of Social Security, he died before completing the statutory waiting period and consequently was not *in receipt of* any benefits from Social Security when he died on September 27, 1981.

After Donald Moore died June Moore filed a claim with the Administration Committee of the Retirement Program for death benefits as the surviving spouse of a permanently disabled employee. This claim was denied solely because Donald Moore was not in receipt of Social Security Disability benefits at the time of his death and was therefore not permanently and totally disabled within the meaning of the Retirement Program. After June Moore's claim was rejected by said Administration Committee she filed suit in the United States District Court for the Southern District of Ohio, pursuant to 29 U.S.C. § 1132(a)(1)(B), to obtain the benefits provided by the Retirement Program under Article 6.3. The

district court on stipulated facts and cross motions for summary judgment found that it had jurisdiction to review the provisions of the Retirement Program for arbitrariness and found that the denial of benefits to June Moore was arbitrary and unreasonable. (Appendix A) The Retirement Program appealed this decision to the United States Court of Appeals for the Sixth Circuit which reversed and held that "federal courts do not have authority to review the provisions of such a plan" for reasonableness. (Appendix B at 11a) The court of appeals limited federal court review to the question of whether the trustees' actions in administering or interpreting a plan's provisions are arbitrary and capricious. (Appendix B)

REASONS FOR GRANTING THE WRIT

THE DECISION BY THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, THE THIRD CIRCUIT, THE NINTH CIRCUIT, AND EVEN WITH A PRIOR DECISION OF THE SIXTH CIRCUIT. THE DECISION ALSO CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH NUMEROUS DISTRICT COURT DECISIONS.

THE ISSUE

FEDERAL COURTS DO HAVE JURISDICTION TO REVIEW FOR ARBITRARINESS THE SUBSTANTIVE PROVISIONS OF A PENSION PLAN ENACTED BY A COMPANY WHERE THE COMPANY RETAINS THE RIGHT TO AMEND AND ADMINISTER THE PLAN THROUGH ITS APPOINTEES.

The decision of the Sixth Circuit denying jurisdiction to federal courts to review for arbitrariness the substantive provisions of pension plans which have been unilaterally enacted and administered by companies is in direct conflict with the recent decision of this Court in the case of *UMW Health and Retirement Fund* v. *Robinson*, 455 U.S. 562 (1982). *Robinson* did not involve a plan that had been unilaterally enacted by the company but rather a plan that had been instituted through the give and take of collective bargaining. The UMW contended and this Court agreed that, if the provisions of a plan have been bargained for between management and labor, then arbitrariness and unreasonableness do not apply and each party is entitled to the fruits of his bargaining. The Respondent Robinson attempted to justify the jurisdiction of the federal court through those cases in which trustees of employee benefit trust funds, not the collective bargaining agreement, fixed the eligibility rules and benefit levels. After

considering this argument this Court could simply have overruled that line of reasoning but instead it took great pains to distinguish those cases on the grounds that "[t]he petitioner trustees were not given 'full authority' to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective bargaining agreement." *Id.* at 573.

The traditional fiduciary obligations of trustees, plan administrators, and other fiduciaries under ERISA has been confirmed by this Court, as follows:

> Whatever may have remained implicit in Congress' view of the employee benefit fund trustee under the Act became explicit when Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829. ERISA essentially codified the strict fiduciary standards that a § 303(c)(5) trustee must meet. *See* 29 U.S.C. §§ 1002(1) and (2); H.R. Conf. Rep. No. 93-1280, pp. 296, 307 (1974).
>
> *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981).

However, *Amax Coal* also indicates that while ERISA codifies standards that must be followed by the trustees, *traditional* rules of equity *also* bind the fiduciaries of a plan.

> Given . . . Congress' use of terms long established in the courts of chancery, we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.
>
> *Id.* at 330.

The Sixth Circuit's opinion below, which seemingly accepts the strict standards of ERISA, clearly deprives federal courts of jurisdiction to enforce traditional equitable obligations imposed on plan fiduciaries by Congress and this Court in *Amax Coal*. The decision below by the Sixth Circuit clearly warrants the review of this Court because it would be strange if Congress imposed traditional fiduciary obligations on plan

administrators but federal courts were powerless to enforce them. *See Dudo* v. *Schaffer,* 551 F.Supp. 1330 (E.D. Pa. 1982), *aff'd.,* 720 F.2d 661 (3d Cir. 1983).

The decision below by the Sixth Circuit runs contrary to decisions of other federal appellate and district courts. The Court of Appeals for the District of Columbia Circuit in the case of *Pete* v. *UMW Welfare and Retirement Fund,* 517 F.2d 1275 (D.C. Cir. 1975) (*en banc*), held that it had jurisdiction to determine whether or not a substantive provision of a union pension plan which had been installed by the union trustees was arbitrary and capricious. The court of appeals further held that where the trustees of a coal miners' pension fund have "full authority . . . with respect to questions of coverage and eligibility," the role of the district court "is limited to ascertaining whether the trustees' broad discretion has been abused by the adoption of arbitrary and capricious standards." *Id.* at 1283. While the role of the lower court may be "limited" to determining whether an arbitrary or capricious standard has been adopted, the court of appeals for the District of Columbia Circuit clearly states that district courts have jurisdiction to make that determination. This Court in *Robinson,* when commenting on the decision by the Court of Appeals for the District of Columbia Circuit in *Pete,* quoted with approval the decision of *Kosty* v. *Lewis,* 319 F.2d 747 (D.C. Cir. 1963) *cert. denied,* 375 U.S. 964 (1964), which states that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." 455 U.S. at 573. Even the Sixth Circuit in the earlier case of *Sellers* v. *O'Connell,* 701 F.2d 575 (6th Cir. 1983), held that federal courts have jurisdiction to review the reasonableness of pension provisions established by the fund's trustees. Although *Sellers* was decided on different grounds, the Sixth Circuit also held that:

> Absent a clearer indication that *Robinson* governs trust

> fund rules formulated by Trustees as well as those included in collective bargaining agreements, we hold that § 186(e) provides jurisdiction over the present claim.
>
> *Id.* at 577.

The Court of Appeals for the Third Circuit in *Knauss* v. *Gorman*, 583 F.2d 82 (3rd Cir. 1978), also affirmed the right of federal courts to review for reasonableness a provision in a pension plan. In *Knauss*, the appellate court was concerned with the possibility that federal courts would be inundated with claims every time a beneficiary disagrees with the discretionary decision of the administrators of a pension plan. The court considered that possibility but went on to say that:

> However, where a settled requirement capriciously excludes employees from benefits, it is not the prudence of the plan's administrators which is at issue but the fairness of its basic structure. Such an exclusion constitutes a failure to conform to the "sole and exclusive benefit" requirement, and thus may be reviewed in the federal courts without doing violence to the congressional intent.
>
> *Id.* at 86.

The sole and exclusive benefit requirement of § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186 (c)(5), uses the same language as ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1). The instant case is not a Section 302(c)(5) case but rather an ERISA case. However, courts have generally applied the same standard of review under ERISA and the Labor Management Relations Act since the same words are used. *Gordon* v. *ICWU-PMA Benefit Plans*, 616 F.2d 433, 438 (9th Cir. 1980).

The Court of Appeals for the Ninth Circuit has held on numerous occasions that federal district courts have jurisdiction to review the decisions of plan fiduciaries since ERISA imposes upon trustees the burden of fiduciary care which is based on traditional equitable principles. Hence, if an eligi-

bility rule, which is unilaterally implemented by the trustee, arbitrarily and unreasonably excludes a participant from benefits, courts can act to correct this structural defect.

Probably the case most factually similar to the instant case is *Music* v. *Western Conference of Teamsters Pension Trust Fund*, 660 F.2d 400 (9th Cir. 1981), *vacated*, 459 U.S. 810 (1982) (for reconsideration in light of *Robinson*, 455 U.S. 562), *on remand*, 712 F.2d 413 (9th Cir. 1983). On remand, the Ninth Circuit reaffirmed its prior decision in words which are unequivocally opposed to the decision by the Sixth Circuit below. Specifically, *Music* held that federal courts have jurisdiction to review the decisions of trustees where "the trustees' actions in *fashioning* or applying those eligibility requirements do not have a reasonable basis or are arbitrary and capricious." 712 F.2d at 419 (emphasis added).

The *Music* Court considered and distinguished *Robinson* on the grounds that it did not apply where changes in eligibility rules could be made unilaterally by the fiduciaries. In the later decision of *Hurn* v. *Retirement Trust Fund*, 703 F.2d 386 (9th Cir. 1983), the court distinguished *Robinson* in the same manner as it had in *Music* and continued to rule that federal courts do have jurisdiction to review the arbitrary acts of plan fiduciaries.

Various federal district courts have determined that federal courts have jurisdiction to review for arbitrariness the substantive provisions of pension plans. Three of these decisions are indistinguishable from the instant case: *Burroughs* v. *Board of Trustees of the Pension Trust Fund for Operating Engineers*, 398 F.Supp. 168 (N.D. Calif. 1975) *aff'd* 543 F.2d 1128 (9th Cir. 1976), *cert. denied* 429 U.S. 1096 (1977); *Blazquez* v. *New York City District Council*, 463 F.Supp. 727 (S.D. N.Y. 1979); and *Fase* v. *Seafarer's Welfare and Pension Plan*, 432 F.Supp. 1037 (E.D. N.Y. 1977) *aff'd.* 589 F.2d 112 (2nd Cir. 1978). In all three of these cases the courts found they had jurisdiction to review for arbitrariness the substantive provisions of pensions and invalidated those substantive

provisions. The district court in the instant case did the same thing. *Moore* v. *Reynolds Metals Co. Retirement Program For Salaried Employees*, 563 F.Supp. 1372 (S.D. Ohio 1983).

Here, the decision by the Sixth Circuit, if allowed to stand, would create the anomalous situation of allowing district courts in virtually every circuit but the Sixth to review the substantive provisions of pension plans for arbitrariness. As the average age of the population of our society continues to creep higher, the provisions of these retirement plans assumes ever greater importance to an increasingly larger segment of the population. The importance of these plans to Congress is exemplified by the imposition of fiduciary standards on plan trustees and fiduciaries through 29 U.S.C. § 1104; the judicial system has also recognized the importance of these plans by holding that not only are the specific fiduciary obligations of ERISA binding on plan fiduciaries but also the traditional rules of equity as well. One of these traditional rules is that a fiduciary owes an unswerving duty of complete loyalty toward the individuals to whom his trust obligation runs. *Restatement (Second) of Trusts*, § 170 (1957). Section 1104 of ERISA also imposes a duty of loyalty upon plan fiduciaries, and the basis for granting jurisdiction to a federal court to review for arbitrariness the substantive provisions of a pension plan arises out of the traditional rule of equity, and its codified counterpart. *See Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3rd Cir. 1984).

How can a fiduciary fulfill his duty of loyalty to a participant or act "solely in the interest of participants and beneficiaries" while enacting or enforcing a provision of a pension plan that is unreasonable and arbitrary? The simple answer is that he cannot, and Congress has given participants in qualified plans the right to the protection of the federal courts under 29 U.S.C. § 1132(a)(1)(B) where he has been deprived of benefits to which he is entitled. It would seem of paramount importance to reassure the millions of participants in qualified plans which have been unilaterally enacted by

their employers, that the jurisdiction of federal courts extends not simply to a review of the administrative acts of fiduciaries, but also to a review of the substance of the plan provisions that they enact. Where from the decisions cited herein, it is clear that other courts of appeal have ruled that jurisdiction should attach to allow federal courts to review the provisions of qualified plans for arbitrariness and unreasonableness, then it is also clear that the decision by the Sixth Circuit below deviates from this accepted and usual course of judicial proceedings and calls for an exercise of this court's power of supervision.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to grant the Petition, to issue the writ of Certiorari, to review the decision of the Sixth Circuit below.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-82-433

JUNE G. MOORE,

Plaintiff,

vs.

REYNOLDS METALS COMPANY RETIREMENT PROGRAM FOR SALARIED EMPLOYEES,

Defendant.

OPINION AND ORDER

(Filed June 1, 1983)

SPIEGEL, J.:

This matter came before the Court on cross-motions for summary judgment (docs. 17, 19) and supplemental and opposing memoranda (docs. 21, 22, 23). There being no genuine issue as to any material fact, judgment is hereby entered with respect to plaintiff's first cause of action for defendant. With respect to plaintiff's second cause of action, however, judgment is hereby entered for plaintiff.

Plaintiff in this diversity action alleges defendant's breach of contract with respect to death benefits from a retirement plan and seeks a declaration of rights and an award of benefits under that plan. The stipulation of facts filed by the parties (doc. 16) establishes the following.

Plaintiff June Moore is the widow of Donald C. Moore, an employee of Reynolds Metal Company (Reynolds) who died September 27, 1981 at the age of fifty-two. At the time of his death he had worked for Reynolds for twenty-eight years. Decedent was a participant in the Reynolds Metal Company Retirement Program for Salaried Employees (Retirement Program), a defined benefits pension plan qualified by the Internal Revenue Service.

Decedent was placed on sick leave status May 15, 1981 and remained on that status until his death September 27, 1981. Although he applied for disability insurance benefits under the Social Security Act, decedent never received monthly cash benefits under the Act because he died before completing the statutory waiting period under the Act.

Plaintiff filed her first claim with the Administration Committee of the Retirement Program June 20, 1982, alleging she was entitled to benefits under Article VI, Section 6.1(b) as the surviving spouse of Donald Moore. That claim was denied for the reason that plaintiff did not qualify for survivor's benefits because Donald Moore died before reaching age sixty-five. Plaintiff then filed a second claim June 8, 1982, alleging her entitlement to benefits as the surviving spouse of a totally and permanently disabled participant who had completed at least ten years of service with Reynolds. This claim was denied because at the time of his death Donald Moore was not "totally and permanently disabled" as defined by Article II, Section 2.4 of the Retirement Program and, therefore, his surviving spouse was not eligible for survivor benefits under Article VI, Section 6.3.

Plaintiff has exhausted all administrative appeals under the Program with respect to both claims.

We agree with the plaintiff that public policy requires that pension and benefits plans be construed, where possible, to avoid the forfeiture of rights which an employee, through years of service, has earned. *Hoefel* v. *Atlas Tack Co.*, 581 F.2d 1, 6 (1st Cir. 1978), *cert. denied*, 440 U.S. 913. Never-

theless, in liberally construing pension and benefits plans, we are bound by the standard for court review of a denial of pension benefits which is whether the denial is arbitrary, capricious, or in bad faith. *Van Gunten* v. *Central States, Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1982). These two principles require the Court to examine closely the language of the pension and benefits plan in question, and construe ambiguities in favor of the beneficiary of the plan. However, they do not permit the Court to read additional provisions into the plan or to torture the plain language of a plan into something other than its obvious meaning so that the Court can reach what seems to it to be a fairer or more reasonable result. So long as the language of the plan is unambiguous, we are obliged to review a denial of benefits in accord with that language.

Plaintiff's first cause of action is based upon Article VI, Section 6.1(d) which provides:

> Commencing with his Normal Retirement Date, the Surviving Spouse of an Employee shall, in the event of the Employee's death prior to becoming a Pensioner, receive a retirement benefit equal to 50% of the benefit to which the Employee would have been entitled in accordance with Section 3.1 as if he had retired on the first day of the month during which he dies.[1]

"Normal Retirement Date" is defined at Article I, Section 1.1(t) as age sixty-five. The clear meaning of Section 6.1(b) is thus that the surviving spouse of an employee who continued to work after reaching age sixty-five is, upon the death of the employee, automatically entitled to one/half of the benefits to which the employee would have been entitled had he retired upon reaching sixty-five.[2] Donald Moore

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[1] The Reynolds Retirement Program as amended and restated January 1, 1975 with additional amendments incorporated through July 1, 1979 is attached as an exhibit to the stipulation of facts (doc. 16).

[2] This automatic entitlement, however, does not occur if the em-

did not reach sixty-five and, therefore, was not entitled to any benefits. Logically then, his surviving spouse, whose right to benefits is strictly derivative, is not entitled to benefits under Article VI, Section 6.1(b). We can find no other construction of this provision consistent with its unambiguous language. *See e.g., Wyzik* v. *Employee Benefits Plan of Crane Co.*, 512 F. Supp. 1222 (D.Mass. 1981), *app. dismissed*, 633 F.2d 348 (1st Cir. 1981).

As there is no disputed issue of fact with respect to plaintiff's first cause of action and as the language of Article VI, Section 6.1(b) upon which that claim is based is unambiguous, we conclude that defendant is entitled to judgment as a matter of law with respect to plaintiff's first claim.

Plaintiff's second cause of action is based upon Article VI, Section 6.3 which provides:

> If a Disabled Participant to whom Section 5.2 applies dies after completing at least ten (10) Years of Service but before electing to receive a retirement benefit pursuant to Section 5.2, his surviving spouse, if any, shall be entitled to receive benefits hereunder if he has been disabled for at least six (6) months at the time of his death. [The remainder of the section describes the benefit to be awarded.]

Section 5.2 provides that an employee who became disabled after January 1, 1981 and is terminated because of "total and permanent disability" as defined in Section 2.4 and who has completed 24 months of service is eligible for certain retirement benefits. Section 2.4 provides that an employee is totally and permanently disabled "as of the date he is considered eligible for, *and* in receipt of benefits under the Disability Insurance Provision of the Social Security Act" (emphasis added).

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ployee who works past age sixty-five elects in writing not to have his spouse covered.

Plaintiff's claim to benefits is derivative and thus if Donald Moore was not entitled to benefits under the terms of the Program, then plaintiff cannot receive benefits as his surviving spouse. It is undisputed that Donald Moore had applied to the Social Security Administration for disability benefits but that he "never received, nor was eligible to receive monthly cash [disability] benefits . . . because he died before he completed the statutory waiting period under the Social Security Act" (doc. 16, p. 4).

Plaintiff, however, argues that the Administration Committee has the power to interpret the Program (Article X, Section 9.1(a)) and to resolve all questions as to the eligibility of any person to receive benefits under the Program, Article XI, Section 9.1(a), (c). Because the Committee has the power to interpret, plaintiff reasons that the denial of benefits solely because her decedent had not satisfied the statutory waiting period under the Social Security Act was arbitrary and capricious. In essence plaintiff admits that Donald Moore was not permanently and totally disabled as defined by the Program but argues that enforcement of a required waiting period is arbitrary and capricious where a pensioner or the surviving spouse of that pensioner meets all other requirements as specified in the Retirement Program.

Defendant's response is that the Supreme Court's ruling in *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982) prevents a court from reviewing the provisions of a pension and benefits plan for reasonableness. *Robinson* involved a pension and benefits trust fund financed by contributions from members of the Bituminous Coal Operators' Association. A 1974 collective bargaining agreement between the United Mine Workers of America and the Association increased health benefits for widows of coal miners whose husbands died before December 6, 1974 and who were receiving pensions when they died, but did not increase health benefits for widows whose husbands died before December 6, 1974 and who were still work-

ing at the time they died although eligible for pensions. Widows in the latter group brought a class action under section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c), alleging that the distinction made between the two classes of widows was not rationally related to the purposes of the trust fund.

Section 302(c)(5) of the LMRA provides that employee benefit trust funds collectively bargained for be maintained "for the sole and exclusive benefit of the employees . . . and their families and dependents." The Supreme Court held that section 302 does not authorize federal courts to review for reasonableness the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. This holding was based upon the Court's reading of the plain meaning and legislative history of section 302(c)(5).

We do not find *Robinson* dispositive. The Court's exclusive focus on section 302(c)(5) limits *Robinson's* precedential value to cases brought pursuant to section 302 of the LMRA. Furthermore, the Court held that a federal court was not authorized to review the provisions for reasonableness but it did not hold that a federal court was precluded from reviewing the enforcement of those provisions in particular cases for arbitrary and capricious results.

The Reynolds Retirement Program is not the result of collective bargaining (Stipulation of Facts, doc. 16). Nor is section 302 a part of this case, for it was brought under our diversity jurisdiction and in no way involves the LMRA. Accordingly, we are obliged to look elsewhere for guidance.

Several pre-*Robinson* cases, although admittedly brought pursuant to section 302 of the LMRA, are useful in deciding whether a denial of pension benefits based solely on the unavoidable inability to satisfy a specified waiting period is arbitrary. In *Fase* v. *Seafarers Welfare and Penion Plan*, 432 F. Supp. 1037 (E.D. N.Y. 1977), the Court held that the

withholding of pension benefits for the three-year period in which it took the Social Security Administration to determine that the plaintiff was disabled was arbitrary. The Court wrote:

> [T]he cases support the conclusion that the justification for denial of benefits must be in some way related to the purpose of such plans to pay benefits to employees of contributing employers. If any denial would be unrelated to that purpose, we think a denial based on delay in the Social Security Administration would be. If any denial would be arbitrary and capricious, this must be it. 432 F. Supp. at 1042, relying on *Haynes* v. *Lewis*, 298 F. Supp. 331 (D. D.C. 1969); *Pete* v. *United Mine Workers of America Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975); *Lee* v. *Nesbitt*, 453 F.2d 1309 (9th Cir. 1971); *Burroughs* v. *Board of Trustees of the Pension Trust Fund for Operating Engineers*, 398 F. Supp. 168 (N.D. Cal. 1975), *aff'd* 542 F.2d 1128 (9th Cir. 1976).

The Ninth Circuit reached a similar conclusion in *Music* v. *Western Conference of Teamsters Pension Trust Fund*, 660 F.2d 400 (9th Cir. 1981), judgment vacated and remanded, 51 U.S.L.W. 3252 (Oct. 4, 1982). The Court held that the requirement that an employee become eligible for federal Social Security disability benefits, which requires a five month statutory waiting period, in order to be eligible for disability pension benefits under the union's plan was arbitrary and capricious and thus a structual defect prohibited by section 302 of the LMRA. The Ninth Circuit was silent on the section 302 issue and accordingly we find it appropriate to look to *Music* despite the Supreme Court's remand for reconsideration in light of *Robinson*. We do not find that remand destructive of *Music's* value in cases challenging actions taken under pension plans not subject to the LMRA.

Plaintiff has also suggested that the regulations of The Pension Benefit Guarantee Corporation established under

the Employment Retirement Insurance Security Act, 29 U.S.C. § 1301 *et seq.*, are instructive in indicating how waiting periods should be reviewed. PBGC Regulations § 2605.6(a), governing benefits in the event of termination of the plan, states that benefits under the plan are nonforfeitable if at the date of the termination of the plan a participant has "satisfied all of the conditions required of him . . . except the submission of a formal application, retirement, or completion of a required waiting period." Of course these regulations apply only to the PBGC and not to trustees of other plans. Nevertheless we find that the purpose of the regulation is to prevent the inequitable forfeiture of benefits for which an employee has worked.

We do not challenge the necessity of drawing lines in determining who is to receive pension benefits under a given plan. Those lines can and should be drawn by the persons responsible for the plan. However, the Court is entitled to review the application of those guidelines to a particular case and to order an award of benefits where the denial is arbitrary or capricious. In the instant case had Donald Moore lived two months longer than he did he would have begun to receive disability benefits from the Social Security Administration. In other words, if his disease process had been slightly less devastating and death less rapid his spouse would have been entitled to the benefits which she is now not receiving. We note further that Donald Moore worked almost thirty years for Reynolds. This is clearly one of those cases in which a particular employee falls between the cracks.

The Administration Committee of the Retirement Program has an obligation as fiduciaries to make decisions in light of all the circumstances of each particular case. We find it is arbitrary and capricious under all of the circumstances of the present case to deny benefits to plaintiff as the surviving spouse of a permanently and totally disabled individual where the decedent has met all of the requirements established by the Retirement Program except for a statutory waiting period.

Accordingly, we declare that plaintiff June Moore is entitled to receive benefits under Article VI, Section 6.3 as the surviving spouse of a totally and permanently disabled employee of Reynolds.

We conclude, therefore, that plaintiff's motion for summary judgment is well-taken with respect to her second cause of action and hereby order that judgment be entered on behalf of the plaintiff and against defendant with respect to that cause of action.

SO ORDERED.

/s/ S. ARTHUR SPIEGEL
United States District Judge

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-3458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNE G. MOORE, *Plaintiff-Appellee,* v. REYNOLDS METAL COMPANY RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed August 10, 1984

Before: ENGEL and KRUPANSKY, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge. June G. Moore (plaintiff-appellee) brought this action under the Employee Retirement Income Security Act (ERISA) to recover survivor's disability benefits from the Reynolds Metals Company Retirement Program (defendant-appellant) (Retirement Program). Moore alleged that a provision in a defined benefit pension plan requiring a five month waiting period before a participant could be declared totally and permanently disabled and, thus, eligible for disability benefits, was arbitrary and capricious.[1]

[1] Moore also alleged that she was entitled to benefits as the surviving

The district court agreed and granted summary judgment in favor of Moore. Because federal courts do not have authority to review the provisions of such a plan, we reverse.

The facts are uncontested. Moore's husband, Mr. Donald Moore, was a salaried employee of the Reynolds Aluminum Company for twenty-eight years and was a participant in the Retirement Program, a plan subject to ERISA. The Retirement Program, a plan which called for no employee contribution, was established unilaterally by Reynolds Aluminum Company. The Retirement Program's provisions specify the circumstances under which death benefits to the surviving spouse of a "totally and permanently disabled" individual may be awarded. Article VI, Section 6.3 of the Retirement Program provided in pertinent part at the time of Mr. Moore's death:

> If a disabled participant *to whom Section 5.2 applies* dies after completing at least ten (10) years of service but before electing to receive a retirement benefit *pursuant to Section 5.2,* his Surviving Spouse, if any, shall be entitled to receive a benefit hereunder. (emphasis added).

Section 5.2 applies only to a participant who is "totally and permanently disabled" as defined in Section 2.4 of the Retirement Program. Section 2.4 provides:

> *Total and Permanent Disability.* For the purposes of the Program, an Employee shall be deemed to be totally and permanently disabled as of the date he is considered *eligible for, and in receipt of,* benefits under the Disability Insurance provisions of the Social Security Act. (emphasis added).

In order to be eligible for benefits under the disability insur-

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spouse of a participant in the Retirement Program who died prior to his normal retirement date. This claim was dismissed and is not before the court on appeal.

ance provisions of the Social Security Act, the potential recipient must meet all of the requirements specified in 42 U.S.C. Sec. 423, which includes completion of a five-month waiting period. 42 U.S.C. Sec. 423(c)(2). Accordingly, a beneficiary of the Retirement Program becomes eligible for disability benefits only upon completing a five-month waiting period following commencement of the disability.

Mr. Moore became afflicted with cancer and was placed on sick leave status on May 15, 1981; he died on September 27, 1981. After her husband's death, Moore applied for benefits as a surviving spouse of a totally and permanently disabled participant of the Retirement Program who had completed at least ten years of service with Reynolds Aluminum Company.[2] Because he did not complete the five-month waiting period, Mr. Moore was not "totally and permanently disabled" as defined by the Retirement Program and, therefore, his wife's application for survivor's disability benefits was denied.

June Moore was successful in persuading the district court to declare the five month waiting period arbitrary and capricious. The sole issue on appeal is whether a federal court may review for reasonableness the provisions of a retirement program established pursuant to the requirements of ERISA, even though the program was not established pursuant to a collective bargaining agreement.

We note initially that an employer has no affirmative duty to provide employees with a pension plan. H. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News, 4670, 4677. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers by granting substantial tax advantages for the creation of

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[2] Mr. Moore had applied for Social Security Disability Insurance, but as both parties acknowledge, he never received benefits, nor was he eligible for benefits, because he died before completing the statutory five-month waiting period.

qualified retirement programs. *Id.* Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan.[3] *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982).

Moore argues that *Robinson* does not apply because the plan in that case was established pursuant to a collective bargaining agreement whereas the plan involved in this case was created unilaterally by the employer.[4] We find the logic of *Robinson* persuasive in either context:

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[3] The danger of judicial interference in the decision concerning which benefits to provide is exemplified by this case. Perhaps the decision to include the waiting period was made due to financial considerations. Clearly, a company such as Reynolds Aluminum is entitled to determine without judicial interference the amount of money it desires or can afford to appropriate for disability benefits. This is especially reasonable in light of the fact that Reynolds Aluminum Company provides all funding for the Retirement Program; participants make no contribution. Similarly, Reynolds Aluminum Company may have made the philosophical decision to confer benefits upon those who would be forced to bear the expense of a long term disability. This type of decision is also reasonable and within a company's prerogative. A company's reason for treating a class of beneficiaries differently is not always readily ascertainable. For this reason, a court should be hesitant to substitute its judgment for that of the company.

[4] Moore argues that this court's decision in *Sellers* v. *O'Connell*, 701 F.2d 575 (6th Cir. 1983), precludes application of *Robinson*. The pension fund in *Sellers* was established pursuant to a collective bargaining agreement. Subsequent to its creation, the fund's trustees passed a resolution which was not part of the collective bargaining

> "[B]ecause finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justifications for an eligibility condition that discriminates between different classes of potential applicants for benefits."

United Mine Workers of America Health and Retirement Funds v. *Robinson*, 455 U.S. 562, 575 (1982). Accordingly, an employer is free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated.

In contrast, once a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits. *Rhoton* v. *Central States, Southeast and Southwest Areas Pension Fund*, 717 F.2d 988 (6th Cir. 1983); *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1982). Such review, however, is limited to a determination of whether the trustees' actions in administering or interpreting a plan's provisions are arbitrary and capricious. Courts may review the trustees' administration of a pension plan because Congress has imposed a fiduciary duty upon trustees to administer such

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pact and this court permitted review of the resolution to determine whether it was arbitrary or capricious. *Sellers* is distinguishable from the case at bar because it focused on the trustees' *application* of the fund's provisions. Clearly, a court may review the *administration* of a pension fund to determine whether the provisions are applied in an arbitrary or capricious manner. However, review of a plan's provisions for reasonableness is improper.

Similarly, Moore contends that the Ninth Circuit has been willing to review a denial of benefits for arbitrariness. *E.g.*, *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983); *Music* v. *Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983). This assertion is correct. The distinction that Moore has failed to appreciate is simply that, while courts may review the trustees' administration of a plan, courts may not modify the clear and plain language of the plan itself.

plans for the sole and exclusive benefit of the beneficiaries. 29 U.S.C. Sec. 1104. *See* H. Rep. No. 93-533, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. and Ad. News, 4639, 4649. Courts, however, have not been authorized by Congress to impose upon employers the court's subjective beliefs concerning the relative value of benefits which employers have chosen voluntarily to confer upon employees.

In summary, judicial interference into the establishment of pension plan provisions is unwarranted.[5] Such interference would serve only to discourage employers from creating voluntarily pension plans. Although Congress sought to establish minimum standards for pension plans to assure that employees would not be denied benefits arbitrarily, it recognized that if standards were too stringent, the creation of new pension plans would be discouraged. *See Holliday* v. *Xerox Corporation*, 732 F.2d 548 (6th Cir. 1984). Thus, Congress struck a balance by providing for judicial review of trustees' administrative decisions while declining to dictate to employers the type of benefits which must be included in voluntarily established retirement plans. The district court modified impermissibly the plain language of the pension plan. Accordingly, the district court's judgment is reversed.

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[5] This lawsuit involves no allegation that the Retirement Program's trustees acted arbitrarily in denying benefits to Moore. Furthermore, Moore has not alleged that the trustees breached the fiduciary duty imposed upon them by ERISA, *see* 29 U.S.C. Sec. 1101, or that the challenged provision is vague and ambiguous. Instead, Moore attacks the propriety of a benefit which the employer voluntarily chose to confer upon salaried employees.